No. _____

In The
Supreme Court of the United States

SCOTT LYNN GIBSON,
ALSO KNOWN AS VANESSA LYNN,
Petitioner,

v.

BRYAN COLLIER
AND DR. D. GREENE,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen L. Braga
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
580 Massie Road, SL-251
Charlottesville, VA 22903
(434) 924-3825
stevebraga@virginia.edu

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Whether an Eighth Amendment claim for deliberate indifference to a prisoner's life-threatening medical need can be disposed of without any individualized medical evaluation of the potential effectiveness of the last remaining treatment for that need if there is not "universal" medical acceptance of that treatment?

2. Whether the Cruel and Unusual Punishments Clause requires that any particular medical treatment sought in prison must be usually provided to prisoners in order for the deprivation of such treatment to be "unusual" enough to trigger the Eighth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

Appellant Scott Lynn a/k/a Vanessa Lynn Gibson ("Gibson") was the plaintiff below.

Appellees Bryan Collier, the Director of the Texas Department of Criminal Justice ("TDCJ"), and Dr. D. Greene were the defendants below.[1]

RULE 29.6 STATEMENT

No nongovernmental corporation is a party to this case.

[1] Gibson's claims against Dr. Greene, who worked at the prison hospital, were not at issue on appeal.

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PETITION FOR A WRIT OF CERTIORARI

In the landmark case of *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court held that:

> elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that 'it is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.' . . .
>
> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment.

Id. at 103-104 (citations omitted). The continued vitality of *Estelle*'s teaching is at the core of this petition.

OPINIONS BELOW

The divided opinion of the United States Court of Appeals for the Fifth Circuit is unreported. *See* Petitioner's Appendix ("Pet. App. ") A1-A61. The summary judgment decision by the United States District Court for the Western District of Texas is unreported as well. *See* Pet. App. A62 – A91.

JURISDICTION

The Fifth Circuit affirmed the district court's grant of summary judgment against Gibson on March 29, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely under 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the Constitution of the United States of America provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Gibson is a pre-operational male-to-female transgender prisoner who has been diagnosed with a life-threatening disorder known as Gender Dysphoria ("GD"). The Texas Department of

Criminal Justice ("TDCJ"), in whose correctional facility Gibson is housed, concedes that this is a "serious medical need" for her. The *only* comprehensive medical standards for the treatment of GD are the World Professional Association for Transgender Health Standards Of Care For The Health of Transsexual, Transgender and Gender Nonconforming People ("WPATH Standards"). Those standards prescribe a triadic sequence of progressive treatments for GD according to the degree of its severity in the individual patient being treated.[2] In the most severe cases, the WPATH Standards recognize Sex Reassignment Surgery ("SRS") as a potentially medically necessary treatment for GD.

Gibson has asked TDCJ to have her medically evaluated for SRS as a potential treatment for her GD because the other treatments provided to her have not worked to cure it. TDCJ has refused to have Gibson so evaluated because its healthcare policy does not authorize SRS as a treatment option for prisoners. The Fifth Circuit majority affirmed the constitutionality of TDCJ's failure to have Gibson evaluated for SRS because the surgery was not "universal[ly]" accepted as a treatment for GD and because SRS was not "usually" provided in prison settings. Pet. App. A2 & A11.

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[2] The triadic sequence is comprised of: 1) changes in gender expression and role; 2) hormone therapy; and 3) Sex Reassignment Surgery. *See* WPATH Standards at 9-10.

Prison Proceedings

As a result of her condition, Gibson is a "female trapped in a male's body," ROA.397,[3] leading her to live openly as a female for over twenty years. ROA.388-89. Despite this self-accommodation, Gibson's condition has also led her to abuse her testicles by tying a string around them until they are swollen and dark purple, causing her severe pain. ROA.407. She does this to "stop the testosterones [sic] from entering into [her] body" and "to destroy [her] testicles" because "the pain of having them is overwhelming and [she] cannot cope." ROA.392. She is in "[constant] mental and physical anguish!" ROA.392.

Gibson has attempted suicide three times while incarcerated. ROA.407. She sliced a vein in her arm, tried to hang herself with her light cord, and overdosed on medication. *Id*. She has also cut herself "over 100 times." *Id*. While Gibson "doesn't claim she attempted suicide solely due to her gender related condition, . . . it did play a significant part in her suicide attempts because the constant stress she deals with is at times overwhelming." ROA.398-99. She "feel[s] Deformed, Nasty and it makes [her] Hate [her] body to the point [she] want[s] to Die." ROA.406.

Gibson's Diagnosis With Gender Dysphoria

During Gibson's incarceration, TDCJ enacted Policy G-51.11 "provid[ing] that transgender inmates must be 'evaluated by appropriate medical and

[3] "ROA" citations are to the Record On Appeal below; "Doc" citations are to the district court's docket entries.

mental health professionals and [have their] treatment determined *on a case-by-case basis*,' reflecting the *'[c]urrent, accepted standards of care*.'" Pet. App. A5-A6 (emphases added). As support for those "current, accepted standards of care," the TDCJ Policy cited *inter alia* the following "reference" sources:

> - 2008 NCCHC Standard P-G-02, Patients With Special Health Needs
> - *World Professional Health Association for Transgender Health website*
> - Diagnostic and Statistical Manual of Mental Disorders 5 (APA 2013).

See Doc 50-1 at 2-3.

The WPATH reference cited by the TDCJ contained the WPATH standards for the treatment of those suffering from GD. Standard of Care XI for "Surgery," and titled "Sex Reassignment Surgery Is Effective and Medically Necessary," provides:

> Surgery - particularly genital surgery - is often the last and the most considered step in the treatment process for gender dysphoria. While many transsexual, transgender and gender non-conforming individuals find comfort with their gender identity, role and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria. *For the latter group, relief from gender dysphoria cannot be achieved without surgery.*

WPATH Standards at 27-8, 59 (2011)(emphasis added).[4] The DSM reference cited by the TDCJ likewise contemplates the necessity of gender reassignment surgery in certain cases. APA DSM 45-458 (5th ed. 2013). Despite the WPATH and DSM medical resources, the new TDCJ policy "d[id] not 'designate [sex reassignment surgery] . . . as part of the treatment protocol for Gender Identity Disorder,'" Pet. App. A5-A6, although it did provide for hormone therapy. Thus, in Policy G-51.11, TDCJ decided to incorporate some parts – *but not all* - of the WPATH standards of care.

Gibson's "desire to casterate [sic] herself" continued after the new policy was enacted so she renewed her request for treatment. As a result, she was sent to the Sky View Unit psychiatric facility, where psychiatrist Robin L. Rigsby formally diagnosed Gibson with GD. ROA.386.

Limited Treatment Is Prescribed For Gibson

After Gibson's GD diagnosis, ROA.386, Dr. McKinney prescribed certain treatments for her GD. Specifically, the doctor prescribed hormone therapy with estrogen-premarin, spirolactone, and finestreride, as well as the "real-life" experience, such as access to a bra. ROA.390. However, Dr. Greene at the prison refused to allow Gibson the

[4] Per WPATH's Standards, SRS is medically permissible only after the patient receives two referrals from medical professionals verifying that the patient has a "persistent, well documented gender dysphoria" and stating the "clinical rationale for support in the patient's request for surgery." The clinical rationale expressly contemplates the inadequacy of the less intrusive treatment options in the triadic sequence of care.

opportunity for the real-life experience portion of her treatment, stating "I have never authorized a 'Man' a pass to live as a female and *I will never do it*!" *Id*. (emphasis added). The hormone therapy helped, but did not cure, Gibson's GD-related mental anguish and suicidal ideations.

Gibson Is Denied Evaluation For SRS Treatment

As a result of her continued suffering, Gibson repeatedly requested that she be considered for SRS. In response to those requests, Gibson was told that "*TDCJ . . . does not provide inmates sex changes for any reason*." ROA.394 (emphasis added). Because of TDCJ's blanket prohibition on SRS, Gibson has not even "been evaluated to see if SRS would adequately treat [her] condition, nor has any doctor made a sound medical judgment [about that potential treatment option] based on [her] medical needs." *Id*. Gibson believes that "if [she doesn't] get a Sex change [she] will end up committing suicide because the older [she becomes] the strong[er] [her] pain gets, as well as the need to abuse [her] body gets." ROA.407.

District Court Proceedings

In light of the TDCJ's refusal to provide her with SRS evaluation, Gibson filed a pro se complaint in the United States District Court for the Western District of Texas alleging violations of her rights under 42 U.S.C. §1983. ROA.376. The heart of Gibson's claim was that TDCJ's "enforce[ment] of a systematic ban on sex reassignment surgery, . . .

creates a policy of deliberate indifference to her gender dysphoria because they refuse to allow her to be evaluated to determine if sex reassignment surgery would be a viable medical treatment option based on her medical needs. Consequently, [she] has to suffer severe mental anguish that causes her to have realistic thoughts of committing suicide and of self-castration." ROA.380.

On October 7, 2015, TDCJ answered Gibson's complaint and argued that Gibson "has failed to state a claim for which relief can be granted under 42 U.S.C. § 1983." Doc. 29 at 2. TDCJ later moved for summary judgment as follows:

> Plaintiff complains that sex reassignment surgery is a cure to his gender dysphoria and that Defendant is medically indifferent to his serious medical needs because she hasn't been provided sex reassignment surgery. Plaintiff does not get to choose her medical treatment. Plaintiff's medical records indicate that she is and has received extensive treatment regarding gender dysphoria. Plaintiff is receiving hormone treatment therapy in accordance with the Correctional Managed Health Care Policy Manual, as well as mental health services. Plaintiff's disagreement with the course of treatment pursued by prison medical staff does not constitute a viable claim for deliberate indifference to serious medical needs under the Eighth Amendment.

ROA.398.

Gibson opposed TDCJ's motion arguing there was a genuine issue of material fact as to whether (1) she had a serious medical condition in GD, (2) TDCJ's policy for treating her GD did not follow that of prudent medical professionals because it eliminated SRS as a treatment option, and (3) TDCJ was deliberately indifferent to her medical needs by enforcing TDCJ's policy against Gibson. As Gibson explained:

> The Defendants claim that Plaintiff cannot choose the care she wants. Plaintiff is not demanding SRS. If the Court goes by her Complaint, it's clear that she is not requesting SRS, rather she is requesting to be evaluated by a GID specialist so the doctor can fully assess her condition and determine whether or not based on her individualized medical needs SRS would adequately treat her condition. If her Doctor cannot assess her medical needs, her condition will not be treated nor will there be a sound medical judgment made.

ROA.399.

On August 31, 2016, the district court granted TDCJ's motion for summary judgment. ROA.419. "Plaintiff's argument rests in part on the premise that the TDCJ's policy is unconstitutional because it does not comply with the treatment standard set forth by the WPATH. *The Court does not dismiss Plaintiffs argument that the WPATH's standard of care has gained wide acceptance. However, Plaintiff provides* as summary judgment evidence only

portions of the WPATH report, and *no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so universally accepted, that to provide some but not all of the WPATH–recommended treatment amounts to deliberate indifference*." Pet. App. A86 (emphases added).

Fifth Circuit Proceedings

Gibson timely appealed the district court's summary judgment ruling to the United States Court of Appeals for the Fifth Circuit, which appointed undersigned counsel to represent her. As relevant herein, counsel subsequently briefed the following issues for the court:

> - Whether Sex Reassignment Surgery is a potential medically necessary treatment for some who suffer from Gender Dysphoria, as recognized by the consensus medical standard of care required for transgender individuals, for purposes of the Eighth Amendment?
>
> - Whether the District Court erred in granting summary judgment against Gibson's claim that Texas' prohibition of Sex Reassignment Surgery as a potential treatment for inmates suffering from Gender Dysphoria violates her Eighth Amendment rights by being "deliberately indifferent" to her serious medical needs?

Supplemental Brief Of Appellant Scott Lynn Gibson ("Gibson Supp. Br.") at 1.

In its opposition brief, after conceding that Gibson's GD presented a serious medical need, Pet. App. 9, TDCJ maintained that Gibson had no constitutional right to the treatment of her choice for GD; that Gibson was being provided with some care for her GD; and that the provision of such care made it impossible to prove that prison authorities were "deliberately indifferent" to Gibson's medical needs.

Gibson filed a short reply brief re-emphasizing her primary claim that "[w]hether SRS might be the proper treatment for Gibson's persistent GD symptoms can only be determined upon such evaluation by a medical professional in light of Gibson's medical history and continued symptoms, including her suicidal ideation." Gibson Reply Br. at 2. As Gibson put it, "evolving standards of decency . . . must require that prison authorities provide adequate medical evaluations of potentially effective treatments to inmates with GD." *Id.* at 17.

Gibson's appeal was ultimately set for oral argument before a panel of Fifth Circuit Judges Jerry Smith, Rhesa Barksdale and James Ho. As the argument unfolded, it became clear that Judge Barksdale was focused on the facts missing from the record in support of the summary judgment ruling below while Judge Ho was focused on broader legal principles that nonetheless controlled the outcome in his view. For example, the district court found the security concerns faced by prisons in dealing with SRS-changed inmates to be "important[]" to its ruling, Pet. App. A86-A87, while Judge Barksdale pointed out that the TDCJ had introduced no evidence even addressing those concerns below. Pet. App. A33. Additionally, the district court relied on the fact that there was no evidence submitted to it

showing that the WPATH standards were "universally accepted" enough to conclude that the TDCJ was deliberately indifferent to Gibson's medical needs in failing to provide one part of the WPATH scheme of care (SRS) to Gibson, Pet. App. A86, while Judge Ho went even further using the First Circuit's decision in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014)(*en banc*) to establish a deliberate indifference-defeating debate in the medical community over SRS *as a matter of law*. Pet. App. A13-A18. As Judge Ho asked Gibson's counsel at argument: "What would be different on remand here that didn't happen in *Kosilek*?" Oral Argument Recording ("Oral Arg. Rec.") at 15:45.[5]

Post-Argument Submissions

Seven weeks after the oral argument, Gibson submitted a Rule 28(j) notice of supplemental authority to the Court, bringing to its attention "the December 13 decision by the United States District Court for the District of Idaho in Edmo v. Idaho Department of Corrections, 2018 WL 6571203 (D. Id. 2018)." Fifth Circuit Doc. No. 514807830 at 1. The pertinence of *Edmo* was described as follows:

> At oral argument of the Gibson appeal, Judge Ho asked Gibson's counsel how a remand of Gibson's case would lead to any different result than the First Circuit's *Kosilek* decision, rejecting a similar claim.

[5] Counsel responded that "Gibson's own particular situation might be different [than Kosilek's] . . . [and] might create a very different record." Oral Arg. Rec. at 15:50 – 16:15.

> The decision in *Edmo*, based on a detailed post-*Kosilek* trial record, demonstrates precisely how such a remand proceeding might turn out differently than *Kosilek* based on the case-specific nature in which the facts are developed, presented and evaluated by the trial court.

Id. Of particular pertinence to Judge Ho's question was the *Edmo* court's express rejection of the SRS-related testimony offered by Dr. Stephen Levine, the state's star witness in the *Kosilek* case.

The state submitted a response to Gibson's 28(j) letter arguing that "[t]he *Edmo* court did not address the First Circuit's decision in *Kosilek* . . . and thus does not rebut the fact that a remand in this case would not provide a different outcome here." Fifth Circuit Doc. No. 514818314 at 1. Citing to *Kosilek*, the state then repeated its position that "[w]ithout a consensus view that SRS should be undertaken, a prisoner cannot begin to meet the burden of an Eighth Amendment challenge – *especially when the state has provided other, reasonable treatment*." *Id.* (emphasis added). The State's response did not address the fact that those "other" treatments provided to Gibson did not cure *her* GD and suicidal ideation symptoms.[6]

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[6] The TDCJ's 28(j) response also mistakenly contended that "[a]ppellant conceded at oral argument that there is *no* consensus on SRS." *Id*. at 3 (emphasis added). As noted elsewhere herein, Gibson made no such concession however. Instead, Gibson merely admitted the obvious point – in response to a question from Judge Ho - that there was no "*universal* consensus" concerning the WPATH standards. Oral Arg. Rec. at 11:10-11:30.

The Divided Fifth Circuit Decision

On March 29, 2019, the Fifth Circuit issued a 2-1 decision on Gibson's claims. Pet. App. A1-A61. In the majority opinion authored by Judge Ho, the Court affirmed the grant of summary judgment against Gibson, finding that her Eighth Amendment claims failed as a matter of law because there was no "'universal acceptance by the medical community' that sex reassignment surgery treats gender dysphoria," Pet. App. A11, *and* because "it cannot be cruel *and unusual* to deny treatment that no other prison has ever provided – to the contrary, it would only be unusual if a prison decided *not* to deny such treatment." Pet. App. A2 (emphasis added). Judge Barksdale filed a lengthy dissenting opinion disputing the majority's conclusions on both points.

The Majority Opinion

The Fifth Circuit majority rested its decision against Gibson on the two alternative holdings referenced above. With respect to "deliberate indifference," Judge Ho set the test as requiring Gibson to "demonstrate 'universal acceptance by the medical community' that sex reassignment surgery treats gender dysphoria." Pet. App. A11.[7] Judge Ho

[7] The majority opinion mistakenly suggests that: "Gibson seems to accept this standard. As his brief notes, *to state an Eighth Amendment claim, he must demonstrate 'universal acceptance by the medical community' that sex reassignment surgery treats gender dysphoria*." Pet. App. A11 (emphasis added). But the highlighted statement is nowhere "note[d]" in either of Gibson's briefs (supplemental or reply) on appeal below. While there are indeed some references to the concept of "universal acceptance" in those briefs, it is mentioned as a result of the district court's initial use of such language in the

found that Gibson's claim failed this "universal" acceptance test because:

> it is indisputable that the necessity and efficacy of sex reassignment surgery is a matter of significant disagreement within the medical community. As the First Circuit has noted – and counsel here does not dispute – respected medical experts fiercely question whether sex reassignment surgery, rather than counseling and hormone therapy, is the best treatment for gender dysphoria. *See Kosilek*, 774 F.3d at 76-78, 87 (surveying conflicting testimony concerning medical efficacy and necessity of sex reassignment surgery).

Pet. App. A2.

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test it employed against Gibson, Gibson Supp. Br. at 19 & 21, not because Gibson believes that this is the appropriate test. To the contrary, Gibson's contention regarding the appropriate test was made just as clear in his own language in the proceedings before the circuit court as it is here. Gibson Supp. Br. at 1 (referring to "the consensus medical standard of care required for transgender individuals") & 24 (referring to "the general consensus of the medical community that the WPATH standards of care govern the treatment of GD prisoners)"; Reply Brief Of Appellant Scott Lynn Gibson ("Gibson Reply Br.") at 13 (stating that the "Eighth Amendment requires . . . deference to the consensus of the expert medical community"); Oral Arg. Rec. at 10:55–11:30 (arguing that *Kosilek* recognized the WPATH as an authoritative medical standard, albeit without "universal" acceptance) & 13:40 ("we've never said that it's universally accepted"). In any event, a party cannot change the governing legal standard by assertions in a brief. *See* Pet. App. A35. The law is what the law is, and no law that we are aware of has ever set this Eighth Amendment standard as requiring "universal acceptance by the medical community."

With respect to the "unusual" text in the Eighth Amendment, Judge Ho set the "original understanding" test as being that the deprivation of a medical treatment in prison "cannot be 'unusual' [unless] it is widely practiced in prisons across the country." Pet. App. A24. He then concluded that Gibson failed this test because "only one state to date, California, has ever provided sex reassignment surgery to a prison inmate. It did so in January 2017, pursuant to the settlement of a federal lawsuit. Before that litigation, no prison in the United States had ever provided sex reassignment surgery to an inmate." *Id*. at A27.

The Dissenting Opinion

With respect to the "universal" acceptance test, the dissent made it clear that the majority erred in "add[ing] th[e] unfounded [universal acceptance] qualification to the well-known deliberate indifference standard." Pet. App. A44. As Judge Barksdale put it: "Tellingly, the majority provides no citation to *any* caselaw regarding this universal acceptance standard. . . . And, a review of relevant caselaw yields *no* support for this standard." *Id*. (second emphasis added).

And with respect to the "original understanding" of the term "unusual," Judge Barksdale found that the majority's "analysis is unnecessary [because] the [relevant Eighth Amendment] standard has been long established." Pet. App. A58 (citing, *inter alia*, *Estelle v. Gamble, supra*). In the dissent's view: "[w]e, therefore, are not at liberty to undertake the text-and-original-understanding analysis. Instead, we must decide only: whether the prisoner has a

serious medical need (the Director has conceded Gibson does); and, if there is a serious medical need, whether the prison has been deliberately indifferent to that need. End of analysis." Pet. App. A59.

This petition followed.[8]

REASONS FOR GRANTING THE PETITION

Misreading this Court's precedent, and the record, the Fifth Circuit majority went out of its way to adopt two blanket rules that will effectively gut the Eighth Amendment's constitutional protections for prisoners' medical care at the hands of the states. First, the Fifth Circuit majority concluded that courts need not consider the medical consensus for treating any particular illness of a prisoner unless that treatment has "universal acceptance." Second, the Fifth Circuit majority concluded that the failure to provide medical treatment to a prisoner can never violate the Eighth Amendment unless that treatment has "usually" been provided to prisoners in the past. Neither of these rules is well-founded and, as binding *per se* rules that are now the law of the Fifth Circuit, each has the potential to wreak great havoc on the basic decency associated with prisoners' health care rights.[9] In addition, the Fifth Circuit's majority decision leads to clear conflicts in the federal circuit courts over the proper tests for

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[8] No petition for rehearing or petition for rehearing *en banc* was filed below.

[9] The Fifth Circuit presides over Louisiana, Mississippi and Texas, which have substantial populations of incarcerated individuals. Texas has the highest in the country. *See* "States of Incarceration," www.prisonpolicy.org/global/appendix_2018.html.

Eighth Amendment claims in this context. Review should be promptly granted by this Court to correct the Fifth Circuit's outlier decision and the grave consequences that will flow from it.

I.

The Potential Necessity of Medical Treatment Should Not Be Defeated As A Matter Of Law Unless That Treatment is Universally Accepted

This case is about adequate medical care. The Fifth Circuit majority's "universal acceptance" or nothing standard makes no sense in this context. For example, the news media this Spring has been filled with devastating reports of outbreaks of the measles: "A fast-moving, life threatening disease."[10] "Experts point to one reason for this year's large outbreak: the power of the anti-vaccination movement." *Id*. In light of this movement, there is certainly a "hot" or "fierce" debate (in Judge Ho's words) over the propriety of vaccinations as a form of health care. Under the decision below, the mere existence of that debate means that the states do not have to provide such vaccinations to prisoners as part of their preventive health care. Do we really want those in our care to be subject to suffering from festering diseases that could be eradicated by inoculation but for the presence of such a debate? Clearly not: "Trump now says parents *must* vaccinate children in face of measles outbreak."[11]

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[10] *See* "Measles accelerates to second-highest level in US in 25 years and over 100,000 global cases," www.cnn.com/2019/04/1

[11] https://www.cnn.com/2019/04/26/politics/donald-trump-measles-vaccines/index.html (Trump says: "They have to get

The same result should obtain here: the imperatives of medical necessity must prevail over the vicissitudes of societal debate.

A. The Unworkable "Universal" Acceptance Standard

The Fifth Circuit majority concluded that Gibson's Eighth Amendment claim could be disposed of on summary judgment because Gibson could not "demonstrate 'universal acceptance by the medical community' that sex reassignment surgery treats gender dysphoria." Pet. App. A11. The majority cited no authority in support of this "universal acceptance" standard but, as Judge Ho saw it, there is "no basis in Eighth Amendment precedent - and certainly none in the text or original understanding of the Constitution – that would allow us to hold a state official deliberately (and unconstitutionally) indifferent, for doing nothing more than refusing to provide medical treatment whose necessity and efficacy is hotly disputed within the medical community." Pet. App. A23.[12]

The dearth of authorities cited by the majority opinion in support of its "universal" acceptance standard is understandable, *because there are none*. If a claim involving expert science could be kicked out of court whenever there was not "universal" acceptance of the expert principle at issue, then there would never be any cases deciding the pros and

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the shots. The vaccinations are so important. This is really going around now. They have to get their shot.").

[12] The majority also cited no support for – or any test for gauging - this "hotly disputed" standard, or for the "fiercely question[ed]" standard it elsewhere employed. Pet. App. A A2.

cons of such expert testimony because there would – by definition - be no dispute about it. Yet cases doing so happen in our courts every day, as the Fifth Circuit majority and dissenting opinions themselves evidence by their reliance on two of those cases: *Kosilek* and *Edmo*, respectively.

Universal acceptance has never been required by this Court to establish a consensus for the "evolving standards of decency" touchstone of the Eighth Amendment. For example, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court's majority and dissenting opinions both considered the pros and cons of nearly evenly split state legislative actions to determine a consensus view against execution of the mentally retarded. Neither side even suggested that the question of consensus could be determined as a matter of law because there was not unanimity. *See also Roper v. Simmons*, 543 U.S. 551 (2005)(to similar effect concerning a consensus view against the death penalty for juveniles).

And when there is a debate over controlling expert consensus due to differing (*i.e.*, not "universal") opinions, the courts have historically relied upon the factfinder to work through the differing opinions based on the evidence before it to decide which one should prevail.[13] As Chief Justice Roberts put it succinctly in a related context just two terms ago:

> 'Psychiatry is not . . . an exact science.' *Ake v. Oklahoma*, 470 U.S. 68, 81(1985).

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[13] *See also Roper, supra* (Scalia, J., dissenting)(suggesting the need for conflicting "scientific and sociological studies" to be "entered into evidence [and] tested in an adversarial proceeding").

> '[B]ecause there often is no single, accurate psychiatric conclusion,' we have emphasized the importance of allowing the 'primary factfinder[]' to 'resolve differences in opinion . . . on the basis of the evidence offered by each party.' *Ibid.*

Moore v. Texas, 581 U.S. ___; 137 S.Ct. 1039, 1060 (2017)(Roberts, C.J., dissenting). [14] "[N]o single, accurate . . . conclusion" sounds like no "universally accepted" conclusion and, as *Moore* indicates, the absence of such a conclusion does not mean the end of the inquiry. [15]

Moore is particularly instructive here because there was not just one but two conflicting areas of medical expertise at issue in the case. First, there was a conflict between accepted medical treatises: "the DSM-5's approach . . . [versus] that of the

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[14] Justices Thomas and Alito joined this dissenting opinion by the Chief Justice, and none of the majority Justices disputed the Chief Justice's opinion on this point.

[15] We imagine that a lack of "universal acceptance" could be found on almost any issue in our sharply divided world. Accordingly, endorsing it as a predicate to medical care for prisoners, as the Fifth Circuit has now done, will leave few – if any – required treatments for inmates who are ill. This will leave the availability of treatment in the virtually unfettered discretion of prison administrators. This Court has been appropriately reluctant to leave such officials in unchecked charge of their own compliance with the Eighth Amendment. *See Johnson v. California*, 543 U.S. 499, 511 (2005)("mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary").

AAIDD." 137 S.Ct. at 1059-1060.[16] Second, there was a conflict between "dueling expert opinions." *Id*. The majority and dissent obviously took different approaches to resolving these multiple conflicts, but the salient point for present purposes is that both sides did so.

Rather than rejecting the conflicting medical standards before them out-of-hand for lack of "universal" acceptance, both the majority and the dissenting justices in *Moore* grappled with how (and which of) those conflicting standards should be applied to determine the merits of Moore's claim. That type of factfinding is exactly what Gibson asked the Fifth Circuit to order at "a hearing on the merits" of her claim. Gibson Reply Br. at 9.[17] But the majority below preempted the need for any factfinder to do so with its unprecedented *per se* ruling as a matter of law.

B. A Reasonable Medical Consensus Supports WPATH

While it is certainly true that there is not "universal" acceptance of the WPATH standards submitted by Gibson, as required by both courts below, it is equally true that there is a strong and reasonable consensus in support of the WPATH Standards. To being with, no other professional

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[16] The acronyms are references to the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders and the 11th edition of the American Association on Intellectual and Development Disabilities clinical manual.

[17] *See, e.g., Chance v. Armstrong*, 143 F.3d 698. 703 (2d Cir. 1998)("Whether a course of treatment was the product of sound medical judgment, negligence or deliberate indifference depends on the facts of the case.")

organization of mental health care, including the APA, has even prescribed alternative comprehensive standards of care for transgender individuals suffering from gender dysphoria; instead, they all defer to WPATH. *See* Am. Psychiatric Ass'n, Report Of The APA Task Force On The Treatment Of Gender Identity Disorder 6 (2011).

In addition, the American Medical Association has unequivocally indicated that WPATH "is the leading international, inter-disciplinary professional organization devoted to the understanding and treatment of gender identity disorders, and has established internationally accepted Standards of Care for providing medical treatment for people with [gender dysphoria] including…sex reassignment surgery, which are… recognized within the medical community to be *the standard of care* for treating people with [gender dysphoria]." Am. Med. Ass'n House Of Delegates, Resolution 122 (A-08), Removing Financial Barriers To Care For Transgender Patients 1 (2008)(emphasis added).[18]

Finally, the National Commission on Correctional Health Care ("NCCHC") acknowledges the WPATH Standards of Care as "[t]he…accepted standards developed by professionals with expertise in transgender health," for prison doctors to follow in

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[18] Similar support for the WPATH Standard of Care has been articulated by the Endocrine Society, the American Psychological Association, the American Academy of Family Physicians, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, the American Society of Plastic Surgeons, and the World Health Organization. WPATH, Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (Dec. 21, 2016).

treating prisoners suffering from gender dysphoria. NCCHC, Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings (Apr. 2015).

This strong consensus from the medical community has led naturally to the WPATH Standards of Care similarly being recognized by numerous courts as the preeminent authority for the care required for GD. *De'Lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) (describing WPATH as "the generally accepted protocols" for treatment of gender dysphoria); *Norsworthy v. Beard*, 74 F. Supp. 3d 1100, 1104 (N.D. Cal. 2015) (describing WPATH as the "leading medical research and standards of care" and granting prisoner suffering from gender dysphoria a preliminary injunction for SRS based on the expert medical consensus from WPATH); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) (recognizing "the 'Standards of Care' promulgated by the [WPATH]" as "the course of treatment for Gender Identity Disorder generally followed in the community"); *Fields v. Smith*, 712 F. Supp. at 838 n.2 (E.D. Wis. 2010) (acknowledging WPATH's Standard of Care as "the worldwide acceptable protocol for treating GID"), aff'd 653 F.3d 550 (7th Cir. 2011). Indeed, even the district court itself said that it "does not dismiss Plaintiff's argument that the WPATH's standard of care has gained *wide acceptance,*" Pet. App. A86 (emphasis added), and even the TDCJ itself cited the WPATH as a reference source in support of Policy G-51.11.

Nothing more should be required to establish a reasonable medical consensus sufficient to establish a genuine issue of material fact for resolution at trial on the issue of whether the course of treatment

provided to Gibson was "constitutionally inadequate" or not. *See Farmer v. Brennan*, 511 U.S. 825, 844-845 (1994). And if not, whether such unacceptable treatment was the result of deliberate indifference or not. *See id.* As Judge Barksdale put it in dissent: "our focus in deliberate-indifference cases is on the actions of prison officials in response to treatment prescribed by medical professionals for serious medical needs of prisoners." Pet. App. A51.[19]

C. The Misinterpretation Of *Kosilek* As Supporting A Per Se Rule

As the majority noted, its conclusion was not based on "the record evidence in . . . any . . . case," but "the governing constitutional standard." Pet. App. A24. This decision effectively changes the law from requiring that prisoner treatment decisions be based on individualized medical evaluations, and the

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[19] The majority opinion's decision effectively pretermitted the analysis of Gibson's claim at the "medically acceptable" point of analysis. It had to do so because TDCJ nowhere offered any evidence to explain the reason(s) "why" it adopted Policy G-51.11 without a provision for SRS if medically necessary. Oral Arg. Rec. at 2:20-2:30. The reasons articulated by the majority opinion for rejecting SRS, of course, can only shed light on TDCJ's motive(s) in this regard if they actually were the reasons relied upon by TDCJ. *See Kosilek*, 774 F.3d at 67-68 ("it is not the district court's own belief about medical necessity that controls, but what was known and understood by prison officials in crafting their policy"). There is no proof in this record that the majority's reasons were in fact TDCJ's reasons. Indeed, the only evidence is to the contrary. *See* Oral Arg. Rec. at 32:27-33:30 (discussing Doc No. 67, submitted by Gibson, quoting TDCJ spokesperson as saying that SRS was not allowed by correctional authorities because it was viewed as being "elective" surgery).

opinions of medical experts based upon those evaluations, to one allowing courts to ignore such medical evidence when the proposed treatments are not "universally" accepted. In place of "record evidence" in this case, the Fifth Circuit majority placed support for its decision almost entirely on the *en banc* decision of the United States Court of Appeals for the First Circuit in *Kosilek v. Spencer*, *supra*.

Kosilek held, on facts tried in 2006,[20] that there was no Eighth Amendment violation in the Massachusetts Department of Corrections' refusal to provide Kosilek with SRS. 774 F.3d at 81-82. There are critical factual differences between Kosilek's case and Gibson's. For example, Kosilek "received significant relief on her [pre-SRS] treatment plan." 774 F.3d at 78. Kosilek had also "already successfully consolidated her gender identity." *Id.* And, perhaps most importantly, Kosilek *never* attempted suicide during her twenty-one year incarceration. Because Kosilek did not require SRS under the Eighth Amendment does *not* mean that Gibson might not require it based upon her own individualized assessment.[21]

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[20] 774 F.3d at 68. In the time since *Kosilek* was tried, as the Harvard Law Review Blog recently pointed out in its note about *this* case, "[s]cientific knowledge of the impacts of gender dysphoria (GD) has grown immensely, and medical care for transgender people is increasingly accessible." Blog.harvardlawreview.org/recent-case-_gibson-v-collier_/

[21] Indeed, even Dr, Stephen Levine, the court-appointed independent expert and star witness for the Department of Corrections in *Kosilek* recognized that there were certain factual scenarios under which Kosilek herself could meet the criteria for SRS *in his view*. 774 F.3d at 79.

Perhaps sensing the weakness of its interpretation of *Kosilek*, the Fifth Circuit majority tried to bootstrap its holding with the following sentence: "The dissent's view also conflicts with *Kosilek* – as both the dissent in *Kosilek* and counsel here acknowledge, the majority in *Kosilek* effectively allowed a blanket ban on sex reassignment surgery." Pet. App. A3. The Fifth Circuit majority's paradoxical reliance on the *Kosilek* dissent here, a dissent whose reasoning the majority rejects on every other point of analysis is striking. But one cannot have his or her cake and eat it too. Having chosen to follow the *Kosilek* majority so dispositively on the merits, the Fifth Circuit majority should fairly be charged with following the reasoning of that majority on this issue as well. In this regard, the *Kosilek* majority could hardly have been clearer on the intended scope of its ruling:

> Kosilek warns, however, that upholding the adequacy of the DOC's course of treatment in this case – despite her medical history and record of good behavior – will create a *de facto* ban against SRS as a medical treatment for any incarcerated individual. *We do not agree*. For one, the DOC has specifically disclaimed any attempt to create a blanket policy regarding SRS. We are confident that the DOC will abide by this assurance, as *any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs*. . . . For another, *this case presents unique circumstances; we are simply unconvinced*

> *that our decision on the record before us will foreclose all litigants from successfully seeking SRS in the future. Certain facts in this particular record . . . were important factors impacting the decision.*

774 F.3d at 90-91 (citations omitted)(emphases added).[22]

Thus, the Fifth Circuit majority opinion is premised on the exact opposite conclusion concerning the scope of the First Circuit's decision in *Kosilek* that the *Kosilek* majority itself reached. There is no reason to condone such inconsistency. In truth, *Kosilek* neither represents nor supports a blanket *per se* rule against SRS claims by prisoners. On this point, therefore, the Fifth Circuit majority's opinion is in clear conflict with *Kosilek*, which was based on a full trial record evaluating the parties' competing claims (just as Gibson requested happen in her case).[23]

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[22] *See also* 774 F.3d at 96 ("Having reviewed *the record before us*, we conclude that Kosilek has failed, *on these facts*, to demonstrate an Eighth Amendment violation.")(emphases added).

[23] *See* Gibson Suppl. Br. at 38 ("this Court should vacate the district court's summary judgment ruling against Gibson and remand this case for trial"). It is difficult to square this express (and repeated) request for individualized fact-finding relief with the majority's assertion that Gibson was somehow asking that Court to rule on her claims as a matter of law independent of the required factual development. *See also* Oral Arg. Rec. at 12:45-12:50 ("question is not whether WPATH is so compelling that it means Gibson wins; the question on summary judgment is simply whether there is enough in the record to create a genuine issue of material fact for some factfinder to address more thoroughly").

D. The Conflicts Created By The Majority Decision

The Fifth Circuit majority's opinion creates a *per se* rule holding that no prisoner can state an Eighth Amendment claim, as a matter of law, for being refused an evaluation for SRS as a potentially medically necessary treatment for GD. And as noted above, in the Fifth Circuit majority's view at least, the First Circuit's *Kosilek* decision leads to the same blanket rule against such claims.[24] If allowed to persist, the Fifth Circuit majority's decision will make every such claim by a prisoner subject to threshold dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a legally valid claim.

A number of other circuits, however, have found that the denial of a prisoner's consideration for SRS properly states a legally valid Eighth Amendment claim as a matter of law. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039-40 (9th Cir. 2015); *De'lonta v. Johnson*, 708 F.3d at 525; *Fields v. Smith*, 653 F.3d at 555. A direct conflict exists between these decisions and the Fifth Circuit majority's decision below. And the *Edmo* case, whose conflicting result was the subject of Gibson's counsel's Rule 28(j) letter to the panel below, is now pending decision by the Ninth Circuit after that Court ordered expedited oral argument which was held on May 16, 2019. *See Edmo v. Corizon, et al.*, No. 19-35017 (9th Cir.).

There is no doubt that Gibson's case would have been decided differently had it arisen in the Fourth,

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[24] *See also Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015)(denying preliminary injunction request concerning hormone care for GD because plaintiff failed to show required "likelihood of success").

Seventh or Ninth circuits. For example, in *De'lonta* the Fourth Circuit recognized that while hormone therapy and real-life experiences can treat some cases of GD, others require SRS when the symptoms persist. 708 F.3d at 523. Similarly, in *Fields*, the Seventh Circuit found that "plaintiffs suffered from a serious medical need, namely GID, and that defendants acted with deliberate indifference in that defendants knew of the serious medical need but refused to provide [necessary] therapy [such as SRS]." 653 F.2d at 554-555. Finally, in *Rosati*, the Ninth Circuit found the plaintiff's complaint was sufficient to state a legally valid claim where "Rosati plausibly alleges her symptoms (including repeated efforts at self-castration) are so severe that prison officials recklessly disregarded an excessive risk to her health by denying SRS solely." 791 F.3d. at 1040.[25]

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[25] In light of the ample authority discussed above, district courts throughout the country have similarly found blanket bans on consideration for SRS as a treatment for gender dysphoria to be unconstitutional under the Eighth Amendment. *See Denegal v. Farrell*, No. 1:15-cv-01251, U.S. Dist. LEXIS 83373 (E.D. Cal. May 31, 2017) (refusing to order summary judgment where a transgender woman alleged vaginoplasty was medically necessary to treat her GID and was only available for cis women); *Shadle v. Frakes*, No. 8:16CV546, 2017 U.S. Dist. LEXIS 53731 (D. Neb. Apr. 7, 2017) (stating the alleged denial of hormone therapy and SRS was sufficient to overcome summary judgment); *Tate v. Wexford Health Source, Inc.*, No. 3:16-cv-00092 U.S. Dist. LEXIS 20391, at *7, *10 (S.D. Ill. Feb. 18, 2016) (holding summary judgment is inappropriate where the prison's policy prevents evaluation for SRS and fails to train personnel to treat transgender inmates); *Barrett v. Coplan*, 292 F. Supp. 281 (D.N.H. 2003) (finding the plaintiff's complaint was sufficient where a policy prohibited hormone therapy and SRS despite repeated self-castration and suicide attempts).

The availability of potentially life-saving medical treatment for prisoners should not be determined, like this, based upon the location of their incarceration.

II

Potentially Life-Saving Medical Treatment Should Not Be Rejected Per Se Because It Is New

Despite having already disposed of Gibson's claim on the foregoing ground, the Fifth Circuit majority went out of its way to find an alternative ground for its ruling "as a matter of constitutional text and original understanding." Pet. App. 24. The majority's decision to do so violated the principle directing avoidance of the unnecessary decision of constitutional questions. "The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring). Yet now the majority's gratuitous alternative holding is the law of the land in the Fifth Circuit.

A. The Original Understanding Test

The Fifth Circuit majority found an alternative basis for upholding the summary judgment against Gibson's claim "as a matter of constitutional text and original understanding." Pet. App. A24. Addressing an issue not briefed by either party, not even mentioned by the district court and raised for the

first time during the rebuttal oral argument by Judge Ho, the majority found that Gibson's claim failed to satisfy the "unusualness" component of the Eighth Amendment's text because "only one state to date, California, has ever provided sex reassignment surgery to a prison inmate." Pet. App. A27.[26] As the Fifth Circuit majority saw it, as a matter of law, "it cannot be deliberately indifferent" for a state "to deny" what "was unprecedented until just recently – and done only once in our nation's history." *Id.* at A28.

Assuming *arguendo* that the majority's dissertation on what "unusual" means as an original matter in the Eighth Amendment is on point,[27] the question still remains as to what level of inquiry of Gibson's claim is to be subject to the "unusualness" test? For example, at one level of inquiry, under this Court's precedents, there can be no doubt that it is

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[26] In fact, as an example of "evolving standards," the California Department of Corrections and Rehabilitation subsequently developed state-of-the-art protocols for the individualized medical assessment of transgender prisoners, including evaluation for gender-affirming surgery. *See Quine v. Kernan*, No. 3:14-cv-02726-JST (N.D.Cal.)(the State's protocols are all on the public docket in this case).

[27] Although the majority opinion recites its unprecedented "original understanding" analysis as if it is nothing more than a traditional search for plain meaning, it is anything but. As a law review article cited by the majority in support of its analysis reveals, the consequences of the analysis can be extreme indeed. See Pet. App. A26 at n.10 (citing John F. Stinneford, *The Original Meaning Of "Unusual"; The Eighth Amendment as a Bar to Cruel Innovation*, 102 NWU L REV 1739, 1745 (2008)). In this article, Stinneford argues, *inter alia*, that this Court's existing Eighth Amendment jurisprudence is all wrong for being improperly based on the "evolving standards of decency" test.

both "cruel *and unusual*" within the meaning of the Eighth Amendment for a prison to be deliberately indifferent to providing adequate medical care generally to the serious medical need of an inmate. *See Estelle, supra.* In other words, prisons have been instructed for decades that they need to provide adequate medical care generally to inmates, so the deliberately indifferent failure to do that would be "unusual" within the ambit of the Eighth Amendment. This is the level of inquiry that the Fifth Circuit dissent understandably pointed to as the test to be applied to Gibson's claim.

However, the Fifth Circuit majority applied its "unusualness" test at a different level of inquiry: specifically, one keyed to the particular medical treatment potentially at issue, SRS, rather than medical care generally. Because SRS has only been provided to one inmate so far, the majority reasons that it cannot be characterized as any type of "usual" form of medical treatment. Therefore, the analysis continues, any refusal to provide SRS can hardly be characterized as "unusual." The Fifth Circuit majority pointed to no Eighth Amendment medical care precedents supporting its conclusion, again, *because there are none*.

Despite the apparent superficial appeal of this new test to the majority, upon deeper analysis it suffers from a number of obvious flaws. First, if this were the proper level of inquiry for the "unusualness" test, then any new medical treatment could be withheld *carte blanche* by prison officials because its very newness would prevent it from being characterized as a "usual" treatment provided by the institution. Under the majority's reasoning, therefore, inmates everywhere would be relegated to

old school medical treatments, with new treatments having to await some unspecified number of usages before they become "usual" enough to be constitutionally required.

Thus, an inmate with terminal cancer for which a new cure has been discovered will not be constitutionally entitled to treatment with that new cure until some unspecified point down the road, regardless of the fact that his life is slipping away day-by-day from the disease. Likewise, any inmate participation in cutting edge clinical trials – no matter how promising - will self-evidently be ruled out of bounds by virtue of their novelty. In the real world of cancer patients, such clinical trials are often the only lifeline left for the critically ill. Yet, under the majority's decision, that lifeline will be cut for incarcerated cancer patients. Instead, those prisoners will simply have to bide their time for some uncertain period until the cure becomes a treatment "usually" provided to prisoners, before they can receive it to cure the insidious spread of this deadly disease through their bodies. As we all know, prompt treatment can be a lifesaver for many diseases, just as assuredly as delayed treatment can be a killer.

III.

This Case Presents A Clean Vehicle For Reviewing The Fifth Circuit's *Per Se* Rules

The Fifth Circuit majority decided this case against Gibson on the basis of two *per se* legal rules it applied to one essential fact. The fact was

Gibson's request to be evaluated for SRS as a potentially medically necessary treatment for her unresolved GD. The rules were: 1) that a potential medical treatment must be "universally" accepted in the medical community before a prison can be deliberately indifferent for failing to consider providing it to a prisoner, and 2) that prisons have to have usually provided a potential medical treatment in the past for the deprivation of that treatment to qualify as "unusual" under the Eighth Amendment.

Because Gibson's request to be evaluated for potential SRS treatment failed under the terms of both rules, in the majority's view, summary judgment was properly entered against her as a matter of law. This case is as simple as that: nothing more and nothing less. The "rules" applied by the Fifth Circuit majority legally doomed Gibson's claim on undisputed facts. Yet those rules are in clear conflict with better reasoned authorities from sister circuits, as well as this Court's own precedents, and they are in stark relief for review by the Court on this uncomplicated record.

CONCLUSION

There are potential political implications to a case like this,[28] but it need not be viewed as a case about "radical social change." Instead of being a highly charged case about transgender rights, it should more properly be viewed as an important case about medical rights for all prisoners. It is the

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[28] *See* Kennerly, "The Fifth Circuit Abandons The Rule Of Law To Spite A Transgender Inmate," https://www.litigationandtrial.com/2019/03/articles/attorney/transgender-inmate.

community of all such prisoners whose claims of inadequate medical treatment while incarcerated will be "doom[ed] to lose, Pet. App. A2, if the Fifth Circuit majority's sweeping *per se* rules are allowed to stand.

The majority's opinion in this case takes established Eighth Amendment jurisprudence concerning adequate medical care for inmates into uncharted waters. First, contrary to the holdings of sister circuits, it dispenses with the necessity for individualized evaluation of potential treatments for inmates' medical needs unless there is "universal" medical acceptance of those treatments. Second, it limits potential medical treatments for inmates to those that have been "usually" provided in the past to such inmates. The Eighth Amendment's ban on cruel and unusual punishments is meant to reflect the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1938). There is nothing "decent" at all about the gutting of potentially lifesaving medical care for inmates accomplished by the decision below.

The petition for a writ of certiorari should be granted.

Respectfully submitted,
/s/ Stephen L. Braga

Stephen L. Braga
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
Appellate Litigation Clinic
580 Massie Road, SL-251
Charlottesville, VA 22903
(434) 924-3825
stevebraga@virginia.edu
Counsel for Petitioner